APPEAL NO. 93478

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On May 27, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: whether claimant sustained an injury within the course and scope of her employment and whether claimant had sustained any disability as the result of her alleged injury. The carrier had accepted liability and the employer herein, under the provisions of Article 8308-5.10(4) contested compensability of the injury. The hearing officer determined that the respondent, claimant herein, sustained a back injury in the course and scope of her employment on (date of injury), and that claimant has had disability since September 4, 1992. Employer contends that the hearing officer did not give enough consideration to medical records of claimant's previous back problem. Claimant did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that she was employed as a maid by the employer and on or about (date of injury) (all dates are 1992, unless otherwise noted) she injured her back while making a bed in the course of her duties. On cross-examination claimant concedes she has had a long history of back pain and back problems. Claimant also testified that when employer's co-owners K and D (Mr. and Mrs. J) came to see her on August 29th about a dispute claimant had with another employee, claimant told them she had hurt her back when she stepped in a hole in her back yard. Claimant testified at the CCH that she had been afraid that she was going to be fired. Claimant worked her regular shift and duties on September 3rd.

The medical records show that claimant was seen in the hospital ER at 8:50 p.m. on 9-3-92, complaining of back, hip and leg pain and that "Pt states this has hurt for 1 week." The history also shows "Onset c 1 wk ago." (Dr. M) in an x-ray report cites problems of five years previous and notes "[t]he degenerative disc disease at the lumbosacral level is severe and is progressive over a period of five years." In an Initial Medical Report (TWCC-61) by (Dr. H) on a date of visit of 9-8-92 recites the history as "[p]atient injured herself while working at [employer's] while putting sheet under mattress. Seen (sic) Dr. S in the Emergency room, Center, TX, on 9/4/92 was placed on bed rest and given Tolectin 100 mg TID."

Apparently a friend of claimant's called one of claimant's daughters on September 3rd and the daughter called s (Ms. B) to look in on claimant. Ms. B is claimant's landlady and testified she found claimant lying on the couch when she visited her on September 4th. According to Ms. B, claimant stated that she had been injured the previous evening when claimant picked up a mattress while making a bed. Ms. B testified she was aware of claimant's previous back problems but was unaware of claimant stepping in a hole in the back yard.

A desk clerk for the employer testified she overheard claimant talking on the telephone to her daughter on Sunday, August 30th, and that claimant had told her daughter that she had hurt herself in her back yard. Mr. and Mrs. J both testified that claimant's two daughters had come to employer's premises on September 6th asking about filing a workers' compensation claim. Mr. and Mrs. J testified they went out to the car where claimant was and claimant agreed she had said that she had hurt her back stepping in a hole in her back yard and admitted she had lied to them about the cause of her back injury. Mr. J testified that one of claimant's daughters had called him on September 8th stating that claimant had "back problems all her life. Just wants to draw work comp."

The hearing officer, in her discussion, noted that claimant's statements "did contain some apparent inconsistencies." The hearing officer notes that claimant worked her full shift on September 3rd and had told Dr. H and Mrs. J that she injured her back at work, therefore the hearing officer apparently believed "claimant aggravated a preexisting back condition while she was performing her job duties on (date of injury)." The crux of the case revolves around the credibility of the claimant.

The employer, both at the CCH and on appeal, emphasized claimant's prior back problems, the fact claimant used liniment on her back, and had complained of back pain in latter August. Employer points to entries in the medical records showing complaints of back pain for at least one week and problems going back five years as evidence that claimant did not sustain a work related injury. The gist of employer's case appears to be that claimant either injured her back previously in her back yard or that claimant's present problems are due to her long standing preexistent back problems.

There is abundant authority that an aggravation of a preexisting condition is an injury in its own right and can be compensable. Texas Workers' Compensation Commission Appeal No. 92463, decided October 18, 1992; Texas Workers' Compensation Commission Appeal No. 91094, decided January 17, 1992. However, as stated in Appeal No. 92463, "a bare assertion that an aggravation has occurred does not relieve the proponent of the burden of proving that an injury, as defined in Article 8308-1.03(27) had been sustained." Further, under the applicable case law, an injury may include an aggravation of a preexisting condition, whether or not that condition was job related. Gulf Insurance Co. v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.). In the instant case, the hearing officer clearly recognized "that claimant has a long history of back problems" and concedes that claimant "may have injured her back stepping in a hole at her residence." These facts apparently are reflected in the medical records showing a back condition 5 years previous and back pain of one week prior to September 4th. Claimant's prior back pain would constitute the "preexisting back condition" which the hearing officer found was aggravated by making a bed on September 3rd.

In Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992, we noted that "[t]o defeat a claimant for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the worker's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977)." (Emphasis added). *Also see* Texas Workers' Compensation Commission Appeal No. 92216, decided July 10, 1992. In the instant case in order to prevail the employer must prove that claimant's present disability, as defined by the 1989 Act, arose solely because of her prior back problems. Merely referring to the hospital medical records of a prior back condition or presenting evidence that claimant had complained of pain or had used back liniment is not sufficient to show that claimant did not sustain an aggravation on September 3rd or that claimant's preexisting back condition is the sole cause of claimant's present problems.

The hearing officer notes, and is supported by the evidence, that there were "some apparent inconsistencies" in claimant's testimony. The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo- 1977, writ ref'd n.r.e.). A claimant's testimony, if believed, can support a finding of injury. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). The hearing officer obviously carefully considered all of the testimony, the hospital and other medical records and based on what claimant told Dr. H on September 8th, and what she told Mrs. J, determined that claimant had aggravated her preexisting back injury while making a bed in the performance of her duties on September 3rd. Based principally on claimant's testimony and the history recorded on Dr. H's TWCC-61, there is sufficient evidence to support the hearing officer's determinations.

We do not substitute our judgement for that of the hearing officer where, as here, the challenged findings and conclusions are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

FILING A CONCURRING OPINION

I reluctantly concur since, although I would have found differently from the evidence presented (*see* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.), I cannot conclude that the findings and conclusion of the hearing officer as so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951). It is apparent that the hearing officer accorded greater credibility to at least key parts of the claimant's testimony than another fact finder might. The hearing officer stated it is not unusual for testimony to contain "minor" inconsistencies. I do not assess the inconsistencies I see as being minor. Indeed, the claimant told others, and was overheard to tell her daughter, that she had injured her back when she stepped in a hole in her yard. She told this to the employer even before the date of the alleged unwitnessed incident of making a bed at the employer's place of business. The medical records are very consistent with this version, as she advised the emergency room that the back pain had its origin a week earlier. The medical records also very clearly indicate the back problems was of long duration: "The lumbosacral interspace shows rather severe degenerative disc disease which has progressed on three previous studies since the initial study of five years age." The x-ray report also notes "no other bone or joint variation is noted." The sum total of the evidence would reasonably support, in my opinion, a different result. This is not, however, a sufficient basis for this reviewing body to reverse and render. *See* Texas Workers' Compensation Commission Appeal No. 93191 and Texas Workers' Compensation Commission Appeal No. 92319.

Stark O. Sanders, Jr.
Chief Appeals Judge